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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1968

NO. 1275

WALTER BUTTERMAN and EMMY BUTTERMAN,
Petitioners,

V.

WALSTON & CO., INC., a New York Corporation, d/b/a in Chicago, Illinois, W. D. FLEMING, Vice President, Chicago Branch of Walston & Co., Inc., ALFRED J. RAUSCHMAN, Vice President, New York, Walston & Co., Inc., BLANCHE BLAHUT, individually and as agent of Walston & Co., Inc., Chicago Branch, JAMES E. SULLIVAN, Office Manager, Chicago Branch, individually and as agent of Walston & Co., Inc., a New York Corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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a) *THIS CASE IS REPORTED IN* (Not Reported as of this date)

b) *GROUNDS FOR JURISDICTION:*

i) *The date of judgment:* December 5, 1967.

ii) *Rehearing denied:* January 25, 1968. (Stay of Mandate granted thirty (30) days from January 30, 1968. Additional stay of mandate granted thirty (30) days from March 2, 1968, by the United States Court of Appeals for

the Seventh Circuit to prepare this Petition for Writ of Certiorari.)

iii) *Statutory provisions conferring jurisdiction:* Section 1254(1) of Title 28, United States Code.

c) *QUESTIONS PRESENTED FOR REVIEW:*

1) Is the right to counsel of choice in a civil proceeding protected against judicial encroachment under the due process clause of the Fifth Amendment?

2) Can a Federal Court require counsel to continue to represent litigants against their wishes in a hearing on the merits after the attorney-client relationship has been severed without violating due process?

d) *THE CONSTITUTIONAL PROVISIONS APPLICABLE:*

Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." (Emphasis added)

e) *STATEMENT OF THE CASE:*

This action was brought to recover losses suffered by petitioners in securities and commodities transactions through alleged violations by one or more defendants of the Securities Exchange Act of 1934, the Commodity Exchange Act of 1936 and Rules and Regulations issued by the Securities and Exchange Commission, United States

Department of Agriculture, New York Stock Exchange and Chicago Board of Trade. Such losses are alleged to have arisen out of violation of statute and rules by the respondent, Blanche Blahut, her employer, the respondent, Walston & Co., Inc., and by the other respondents for failure to perform their responsibilities respecting supervision of the conduct of Mrs. Blahut in excessive and unauthorized "churning" of petitioners' account.

Commissions charged by Walston & Co. in these accounts during 1959 were: $3,328.44 for commodities transactions and $697.96 for securities transactions. From original portfolios of cash and securities of $16,389.35, Walston & Co. purchased for plaintiffs commodities contracts alone during 1959 costing in excess of $1,800,000. (Plaintiffs' Exhibit 2, App. 68).

Defendants Walston and Fleming recognize losses to plaintiffs in the amount of $8,189.77. (Affidavit of W. D. Fleming, App. 76). Plaintiffs have asserted losses of $17,500.00 or more. (Amended Complaint, Count I, par. 15; Count V, par. 22; App. 32c).

The first complaint was filed on December 28, 1962. After motions, amendment of pleadings, discovery, dismissal of several defendants, resignation of plaintiffs' original counsel and several continuances, the court set this case for trial on December 16, 1966.

Plaintiffs' counsel informed them in July that she did not wish to represent them but refused to withdraw from the case without leave of court. (App. 99-100) On December 15, 1966, the day prior to the trial, the plaintiffs expressly informed the court that counsel was "unprepared" and "not for us," (App. 90, 94), and that they did not want record counsel to represent them and had accepted her resignation. (App. 89-90) Plaintiffs also informed the

court that record counsel did not have available accountants' statements showing the loss sustained. (App. 93-94) Record counsel refused to appear for the plaintiffs and request a continuance and required the plaintiffs to appear *pro se*. (App. 89-99) Plaintiffs attempted to substitute counsel prior to making the motion for continuance. (App. 90-91, 100) These representations were confirmed by record counsel in open court outside the presence of the plaintiffs on the following day. Record counsel informed the trial court that:

> "I do say this, your Honor, I am and was most anxious to withdraw from this case. The Buttermans had apparently formulated a theory that I could not and still do not understand. I told them that. I told them that I was unable to intelligently present that theory." (App. 101)

The court then heard evidence presented by plaintiffs' record counsel in the form of 27 exhibits and testimony of the defendant, Blanche Blahut. (App. 106-116) After hearing this evidence the court entered judgment for each of the remaining individual defendants and against plaintiffs and also found for the plaintiffs against the defendant Walston in the amount of $313.16, which represented plaintiffs' account balance with defendant brokerage firm.

Upon appeal to the Seventh Circuit Court of Appeals, that court, in its opinion filed December 5, 1967, affirmed the judgment of the trial court.

f) *THE MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED:*

Because the trial court refused to allow discharge, withdrawal or substitution of counsel, the plaintiffs were required to file their notice of appeal *pro se* and assert their constitutional rights for the first time in the United States Court of Appeals for the Seventh Circuit.

APPELLANTS' BRIEF

Filed with the United States Court of Appeals for the Seventh Circuit ASSERTED THE FOLLOWING:

SUMMARY OF ARGUMENT

* * *

3.) The trial court's failure to permit a substitution of attorneys by the plaintiffs denied the plaintiffs a fair trial and therefore violated the "due process" clause of the Fifth Amendment to the Constitution of the United States because:

a) Counsel was unwilling to represent plaintiffs.

b) Counsel expressed to the trial court her personal opinion as to the lack of merit to plaintiffs' "theory of the case".

c) Counsel refused to appear and request a continuance to allow substitution of counsel and preparation of accounting statements.

d) The relationship of attorney and client had been severed and therefore plaintiffs were not represented by counsel or *pro se* at the trial on the merits. (App. Brief pp. 11-12)

CONTESTED ISSUES

* * *

2.) Did the trial court deny the plaintiffs due process of law as protected under the Constitution of the United States, Amendment V, by denying plaintiffs their absolute right to discharge and substitute counsel and thereafter conducting a trial on the merits? (App. Brief p. 13)

ARGUMENT

I.

THE COURT HAS NO POWER OR RIGHT TO REQUIRE AN ATTORNEY AND CLIENT TO PROCEED TO A HEARING ON THE MERITS WHERE BOTH THE ATTORNEY AND CLIENT HAVE ATTEMPTED TO SEVER THE RELATIONSHIP.

The trial court stated unequivocally seven (7) times that the parties of interest would not be permitted to accept the resignation, discharge or substitute record counsel.

> "The Court: She has not presented a petition before *me* to withdraw from the case."
>
> • • •
>
> "The Court: She has not presented *me* a petition to withdraw." (App. 87-88) (Emphasis added)
>
> • • •
>
> "The Court: She cannot — even though she resigns to you, she cannot resign from the case until she resigns to *me.*" (App. 88-89) (Emphasis added)
>
> • • •
>
> "The Court: *I* will not allow her to withdraw from the case at this time. It is one day before trial. Nor will *I* permit another attorney to enter the case, nor will *I* permit a continuance of the case."
>
> • • •
>
> "The Court: You hired her. You wanted her at one time. That was sufficient."
>
> • • •
>
> "The Court: *I* do not want her to withdraw."
>
> • • •
>
> "The Court: Well, *I* will have to keep her in the

case and go ahead with the case." (App. 89-91) (Emphasis added)

A.

THE FACTS SHOW:

This was a complicated and involved legal proceeding.

On separate occasions the court recognized the complexity of this case. On June 27, 1963, the court acknowledged:

> "The Court: I had not had an opportunity to complete my study of this case. It is a little difficult for me. I have wanted to get in touch with counsel ahead of time to indicate that I prefer to have more time.
>
> Since it is not that old a case, I think that I should, rather than rule off the cuff without being totally and fully advised, I will check back on these cases also and I will rule by mail during the course of the summer. So I think the thing I should do is have a status report date in which we can see what to do. Will you make that the 17th of September." (App. 64-65)

And on April 29, 1966:

> "The Court: Yes. Actually, I am afraid I am going to have to try this case. Because of the age of the case I would like to get down to trial. It has been excellently handled by counsel for plaintiffs. They pulled together a matter which I think has stuck under the statutes and the law, which is an exceedingly difficult one to make it stick." (App. 86)

But on the day prior to trial in denying the continuance, the court showed an unawareness of the complexity of the issues presented.

> "The Court: What is this case about?
>
> Mrs. Butterman: I wish you would take this letter and read for yourself. This is perfect evidence she does not want to have anything to do with it.
>
> Mr. Conger: This is an action in which the plaintiffs claim, among other things, that the Walston & Company, and some of its employees, have conspired

against the plaintiffs and that they had caused $17,000 in actual damages, and plaintiffs seek $100,000 in punitive damages. They allege violation of the Securities Exchange Act, 1934, of the Commodity Exchange Act, Illinois common law on fraud and deceit.

The Court: Who is Walston & Company?

Mr. Conger: Walston & Company is a stock and commodity broker which acted for the plaintiffs in various trades that were consummated in their account.

The Court: This says against Blanche Blahut.

Mr. Conger: Blanche Blahut was the employee of Walston with whom the plaintiffs dealt.

The Court: What discovery has been progressed in this matter?

Mr. Conger: Some extensive discovery has taken place, your Honor. There has been requests for admission; there have been interrogatories; there have been depositions of the plaintiffs and Blanche Blahut; there have been depositions of the plaintiffs and Blanche Blahut; there have been motions to produce documents, voluminous documents have been produced by the defendant." (App. 92-94)

The following day the court disposed of this matter "on the merits" between the hours of 2:00 P.M. and 5:00 P.M. The court now claimed to have a comprehensive knowledge of the issues presented against the several defendants, reviewed the entire record of 1572 pages, in addition to the testimony, depositions and the 27 exhibits admitted during the proceeding.

The Court: "I have reviewed the entire record in this matter. I have listened to all of the evidence and reviewed all of the exhibits and I might say that over this three years of litigation, four years of litigation of this matter in which it has been before me, after I inherited it from Judge Will, I have kept up almost weekly and monthly with transactions of the various attor-

neys and the matters that are complained of in the matter, and have an opportunity to look into it." (App. 120)

This explains the erroneous basis of the judgment (as discussed later). It also is ample evidence as to an abuse of the court's discretion in failing to continue this cause until a proper accounting statement could be presented to the court by an attorney of the Plaintiffs' choice. As the court observed, the action was brought in "good faith" and "by lawyers and clients and not by accountants", (App. 121) tacitly recognizing the admitted difficulty in establishing the proper method of proving damages without a detailed account of transactions as shown on the records of the defendant, Walston & Co., Inc. This was not even attempted by record counsel for the plaintiffs or by counsel for the several defendants. The judgment entered for the Plaintiffs and against the defendant, Walston & Co., Inc., in no way approximated their actual loss.

B.

Valid Cause of Action.

The trial court, on May 18, 1966, as a basis for refusing the plaintiffs' motion for summary judgment, specifically held there were certain fact questions to be decided.

> "I hereby deny the motion for summary judgment filed by plaintiffs pursuant to Rule 56 of FRCP since several issues of material fact remain in dispute. The following list is not intended as exhaustive; (1) Whether Blanche Blahut was a 'Customer Man' of Walston & Co., since Jan. 1, 1959. (2) Whether plaintiffs were joint traders with Walston & Co. on Jan. 2, 1959. (3) Whether Walston & Co. 'fraudulently' failed to disclose to plaintiffs that Mrs. Blahut was not a fully registered representative. (4) Whether the transaction referred to in Count I, par. 6, occurred on Jan. 8, 1959, or on Jan. 2, 1959. (5) Whether Walston & Co. held out Mrs.

> Blahut as a registered representative or as a trainee under supervision. (6) Whether on Jan. 29, 1959 Blanche Blahut purchased for plaintiffs one contract of May Soybean meal contrary to law. (7) Whether there was any causal connection between alleged inexperience and lack of qualifications of Blanche Blahut and losses sustained by plaintiffs as alleged in Count II, par. 22. (8) Whether there has been a willful violation of Sec. 10(b) of the Securities Statute and the rules promulgated thereunder. —" (App. 18-19)

Prior to that time, on April 29th, the court stated that although it would not at this time grant the plaintiffs' summary judgment, that plaintiffs had shown a cause of action which would justify a recovery.

> "The Court: Yes. Actually, I am afraid I am going to have to try this case. Because of the age of the case I would like to get down to trial. It has been excellently handled by counsel for plaintiffs. They pulled together a matter which I think has stuck under the statutes and the law, which is an exceedingly difficult one to make it stick.
>
> I have a hard time finding summary on the face of it. I will give another look at it between now and the trial date, but let me set the trial date. *In the meantime, why, Walston & Company may consider the advisability of offering a very, very attractive settlement to the plaintiffs.*" (App. 86) (emphasis added)

However, in entering final judgment in this cause, the trial court did not resolve any of the fact questions set forth in his earlier rulings and did not make any findings of fact or conclusions of law on any claim or issue presented in the pleadings, or preserved in its ruling denying Plaintiffs' motion for summary judgment.

C.

A-Failure to Allow Discharge, Withdrawal and Substitution of Attorney.

The plaintiffs could have proceeded to the trial date relying upon their counsel of record to complete preparations. However, lack of diligence of trial counsel is grounds for non-suit under 41(b) of Federal Rules of Civil Procedure. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 8 L. Ed. 734, 8 S. Ct. 1386 (1962). This case came to the Supreme Court on writ of certiorari to this same court, the Seventh Circuit Court of Appeals, after a divided appeals court held that an attorney's lack of diligence was imputable to clients who had selected him as their counsel of choice. The Supreme Court in a sharply divided 4-3 decision, with two Justices abstaining, affirmed. The rationale applied by both majority and dissenting opinions of the Court of Appeals and the Supreme Court offered some guidance for the case at bar. All opinions recognized the desire for a trial on the merits and contrasted the duty of an attorney to protect his clients' interests. The determining factor in the majority opinion was that the clients vested control and authority over their cause of action *in an attorney of their choice.* The striking feature of the case at bar is that the plaintiffs were not non-suited; instead they were forced to a trial on the merits, *without* an attorney of their choice.

The plaintiffs repeatedly attempted to discharge their attorney of record, who admittedly did not wish to proceed as their counsel. On July 19, 1966, plaintiffs' record counsel conveyed her desire to no longer represent them.

> "Miss Lavin: . . . 'I will request, therefore, that you and Mrs. Butterman do your utmost and immediately to obtain other counsel, . . .'." (App. 99)

Record counsel again conveyed her desire to resign in recognition of the plaintiff's desire that she no longer represent them.

> "Reference is made to your letter of November 25th, 1966. Please be advised that I have not resigned from

> your case but ask you please to locate another lawyer so that I can get out of the case, as I feel you will never be satisfied with my handling of the case whatever the result . . ." (App. 99)

The plaintiffs had contacted another attorney in an attempt to substitute counsel. Record counsel informed plaintiffs on December 7th:

> "A Mr. Fishman has contacted me relative to your hiring him as your lawyer. Please contact me immediately so that I may withdraw my appearance." (App. 100)

However, subsequent telephonic notes, read into the record in plaintiffs' absence by their counsel of record, indicated:

> "I cannot resign, not until or if *you* get another lawyer. If *you* don't, *you* had better go to trial —" rather, "be ready to go to trial on December 16th. I will assist *you* in the trial —" and other further matters.
>
> "*You* have to go to trial, if *you* do not *yourself* go in and get an extension, otherwise *you* will be defaulted."
>
> • • •
>
> "Reference is made to Mrs. Butterman's letter of December 12. If *you* wish the trial to be continued, it will be necessary that *you,* 'underlining *you*' — 'do so'." (App. 100) (emphasis added).

Counsel of record then proceeded to inform the court that her clients "had formulated a theory that I could not and still do not understand." (App. 101) After this highly prejudicial statement record counsel proceeded to a bench trial "on the merits."

There is no rule of the U.S. District Court for the Northern District, which requires leave of court prior to withdrawal, discharge or substitution of counsel and yet the court and record counsel effectively precluded plaintiffs from securing counsel of their choice to prepare for trial.

If record counsel had shown the same concern for her clients as for this non-existent rule of court, plaintiffs may have been able to substitute attorneys and prepare for trial. Instead, counsel insisted on remaining attorney of record, up to and including the trial on the merits. The court also concurred in this view and not only refused the continuance, but specifically refused plaintiffs their right to discharge or substitute counsel of their choice. Even if there was a rule requiring leave of court prior to withdrawal of counsel of record, these types of rules are designed to protect the client, not the court *or the opposition. Lovvorn v. Johnston,* 118 F. 2d 704, 706 (9th Cir. 1941). The right to counsel of one's choice is absolute.

> "It appears to be generally agreed that a client may, *at any time,* terminate the relation between himself and his attorney, *with or without cause.* The existence or nonexistence of a valid cause for the discharge of an attorney is important only in determining his right to compensation or damages. This right of a client is an implied term of every contract of employment of counsel, at least when the latter is not vested in some way with an interest in the cause of action or its subject matter. The right is deemed necessary in view of the confidential nature of the relation between attorney and client, and the evil that would be engendered by friction or distrust." (7 Am. Jur. 2d, Attorneys at Law, Sec. 138, p. 132)

This rule applies to substitution of attorneys.

> "Unless the attorney has an interest in the subject matter of the suit, a party has the right to change his attorney of record at any stage of the cause, and substitute another attorney." (7 Am. Jur. 2d, Attorneys at Law, Sec. 148, p. 135)

The Federal Courts have uniformly and without exception recognized the absolute right of a client to discharge counsel at any stage of the proceedings, (*Doggett v. Deau-*

ville Corporation, 148 F. 2d 881, 882-883 (5th Cir. 1945), and in addition recognized a court's lack of power to compel record counsel to continue after termination of the attorney-client relationship.

> "While it is quite true that, under certain circumstances, counsel cannot be relieved without permission of the court, see United States v. Curry, 1848, 6 How. 106, 47 U.S. 106, 12 L. Ed. 363; Doggett v. Deauville Corp., 5 Cir., 1945, 148 F. 2d 881; Lovvorn v. Johnston, 9 Cir., 1941, 118 F. 2d 704, cert. denied 314 U.S. 607, 62 S. Ct. 92, 86 L. Ed. 488, there is no requirement of law or common sense that a court compel counsel to continue to represent a former client when there had been a termination of the attorney and client relationship before trial by mutual consent, which is what happened in this case." *McDonnell v. Tabah,* 297 F. 2d 731, 733, (2nd Cir. 1962).

The trial court showed the same unawareness of the foregoing principles when it ruled upon the motion for continuance, after plaintiffs were required to appear pro se. The following excerpts are illustrative of the court's misinterpretation of the attorney-client relationship:

> "Mr. Butterman: Your Honor, we are faced with a regrettable situation here, with the withdrawal of Miss Lavin, and I have to have time — at least, I would like the Court's permission to have time — to get another counsel.
>
> The Court: She has not presented a petition before *me* to withdraw from the case.
>
> Mrs. Butterman: She cannot withdraw before we have another attorney.
>
> The Court: She has not presented *me* a petition to withdraw." (App. 87-88) (emphasis added)
>
> • • •
>
> "Mrs. Butterman: She has declared to me that she cannot withdraw before we have another attorney,

which is the fact. We have accepted her resignation. Here is the proof that she has resigned and we have accepted it.

The Court: She cannot — even though she resigns to you, she cannot resign from the case until she resigns to *me.*" (App. 88-89) (emphasis added)

* * *

"Mrs. Butterman: Your Honor, I have asked Miss Lavin to put in a motion for postponement of this trial today before I filed this motion.

The Court: I believe she did make a move to ask it to be postponed and I denied that.

Mrs. Butterman: No, she has refused to make such a motion. That is why I have made it with my husband. She has refused to do it because she could not do it. She could not withdraw before we have another attorney. Now, we have already made commitments with another attorney.

The Court: *I* will not allow her to withdraw from the case at this time. It is one day before trial. Nor will *I* permit another attorney to enter the case, nor will *I* permit a continuance of the case.

Mrs. Butterman: Your Honor, we cannot be forced to have an attorney at the trial that is not for us. She has repeatedly declared to us, and here in this letter, that she will not represent us in this trial. Now, what can we expect? We cannot be faced with the fact that we have an attorney that we don't want in such a matter.

The Court: You hired her. You wanted her at one time. That was sufficient.

Mrs. Butterman: That has changed and it is her desire. We never asked such a thing from her. She has said she will not under any circumstances represent us.

The Court: Well —

Mrs. Butterman: She is not here today. That is proof that she agrees. That is what she wants. She wants withdrawal. Here is a letter from her, a recent letter.

The Court: *I* do not want her to withdraw.

Mrs. Butterman: Well, we do not want her for the trial. We do not want anybody in here that is not for us. We have made commitments with another lawyer who is a securities lawyer and who will represent us, but this cannot be done from one day to another. We need time, at least thirty days' time or at least fifteen days' time.

The Court: Who is the attorney that you say is going to represent you?

Mrs. Butterman: This is Mr. Fishman, William R. Fishman, who is a securities lawyer." (App. 89-91) (Emphasis added)

* * *

The Court: Did *you* give notice to Miss Lavin *you* were coming in this morning?

Mrs. Butterman: She had notice. She is not here. This is to me an indication that she agrees, and she said, 'I cannot make a withdrawal before *you* have an attorney and I cannot make a motion for postponement before *you* have another attorney,' which is all right. She has agreed. That is all she wants, to withdraw.

The Court: Well, *I* will have to keep her in the case and go ahead with the case.

Mrs. Butterman: But we are not ready. She has done nothing, what should be done for the trial. I will not go to trial before the depositions are here.

The Court: The cause will be called for trial tomorrow. The motions are denied." (App. 91)

Mr. Butterman: Your Honor, Miss Lavin is not prepared.

The Court: Let her tell *me* that. *She will be here tomorrow.* Motion denied.

Mr. Butterman: All the witnesses have not been summoned, your Honor. We have witnesses and no summons have been sent out. We are not prepared for trial. We need fifteen days, your Honor.

The Court: Motion denied." (App. 94-95) (Emphasis added)

The foregoing is a classic illustration of the *Link* rationale in reverse.

1) Litigants informing the court of their counsel's lack of diligence and unwillingness to proceed.

2) Plaintiffs denied counsel of their choice by substitution.

3) Plaintiffs denied their right to discharge counsel.

4) A "trial on the merits" instead of a non-suit and the opportunity to vacate under Rule 60(b).

In light of the undisputed facts, it is apparent that:

1) Plaintiffs were denied their right to discharge counsel before trial by record counsel's failure to withdraw.

2) Plaintiffs were denied their right to substitute counsel before trial by record counsel's failure to withdraw.

3) Plaintiffs were denied their right to discharge counsel by ruling of the trial court.

4) Plaintiffs were denied their right to substitute counsel by ruling of the trial court.

5) That counsel of record failed to appear and request a continuance and requested that his clients appear *pro se* to present said motion.

6) That counsel of record did not represent her clients' best interests.

7) That plaintiffs did not have available accounting statements to make proof of loss.

8) That the judgment "in favor of plaintiffs for $313.16" in no way approximates the actual loss sustained. Therefore, the denial of a continuance was an abuse of the trial court's discretion and a denial of due process.

D.

The Judgment Is Erroneous On Its Face.

The trial court found for the plaintiffs and against the defendant, Walston & Co., Inc., in the amount of $313.16. However, this judgment is in no way related to any cause of action stated by the plaintiffs in their amended complaint, as amended. The issue of damages was a critical issue in this case, and no evidence was submitted as to the loss sustained by the plaintiffs. The court entered judgment on the plaintiffs' account balance.

> "The Court: That accounting shows what, sir, with relation to the liabilities of Walston & Company?
>
> Mr. Conger: Well, it shows the requests for admissions that was served upon the plaintiffs set forth therein just exactly what gains and what losses had resulted in the plaintiffs' accounts.
>
> The Court: Does it not show that there is, in fact, an amount due the plaintiffs?
>
> Mr. Conger: It shows, I believe it shows in one of the accounts that there is a credit balance, —
>
> The Court: Of how much?
>
> Mr. Conger: — for which plaintiffs never made any request that it be paid out to them.
>
> The Court: And that balance is how much?
>
> Mr. Conger: I believe it appears, your Honor, on Plaintiffs' Exhibit —

The Court: 26?

Mr. Conger: 26, yes.

The Court: Is that the balance you have in mind?

Mr. Conger: Yes, it is, $313.16, shown as a credit balance on the last monthly statement which is part of Plaintiffs' Exhibit 26.

The Court: Well, I consider, counsel, that the filing of the suit constitutes itself a demand." (App. 119)

However, the plaintiffs made no claim for the balance of money remaining in their account. This was their money and was not a matter in dispute.

"Mr. Conger: Well, in the four counts of the complaint, which are directed against my clients, nowhere in there is there a claim that plaintiffs requested any credit balance showing, or any credit balance be paid over to them and the request was denied.

The Court: But they did sue for any and all balance, including the difference which they claim was due them, isn't that correct?

Mr. Conger: Well, I thought their claim was more in tort than in contract, your Honor.

The Court: As well as punitive damages, which would cause it to have to be in tort, of course, so to speak, in tort, but also brought under the Securities Exchange Act, isn't that correct?

Mr. Conger: Yes, I thought that created duties, but did not, in itself, create contracts." (App. 120)

Because of the failure to proceed on an adversary basis the court erroneously concluded that although the plaintiffs had stated a cause of action they had only sustained damages of $313.16.

"I am prepared to dismiss this action — I would be prepared to dismiss this action on the jurisdictional amount, but I think that under the circumstances that

the complaint and the amended complaint was drawn, it was drawn in good faith, even though the jurisdictional amount may very well have been determined by the use of accountants at the very outset to be no more than $313.16, and would not justify its not having been brought. It was brought by lawyers and clients and not by accountants under the circumstances, and it is only the good faith which we are required to determine in the bringing of the matter.

If it had been a different kind of matter which easily could have been ascertained by a layman or by a little super-layman, that is a lawyer, I would have dismissed it for want of jurisdictional amount, because even brought under the Securities Exchange Act, under federal law the jurisdictional amount still must be $10,000 and the case does not belong in this court. But I think that it was brought in good faith under that amount so I will not throw the case out for that reason. (App. 120-121)

. . .

"In view of the fact, however, that this matter was brought, the defense was brought in good faith, there isn't any reason to suppose that under the pleadings that you would have to not only defend against the matter in contract as well as a matter in tort, and since you were compelled also to defend against allegations which were of the nature of allegations in tort, I cannot award to the plaintiff — sorry, counselor — I cannot award to the plaintiff reasonable attorney's fees and costs of the suit. The petition contained therein is denied. All other relief is denied.

There will be entry of judgment upon the statements heretofore made, and the findings of the Court herein recited which refer over to the documents in evidence as findings of fact and conclusions of law. Judgment for the plaintiffs and against the corporate defendant in the amount of $313.16." (App. 122-123)

This conclusion was unwarranted under the circumstances, as the defendant, Walston & Co., Inc., records admitted a

total net loss of $8,199.58, as shown in an affidavit of defendant, William D. Fleming:

> "3. During the period Mr. and Mrs. Butterman maintained an account with Walston & Co., Inc., they deposited a total of $16,389.35 into their account and made cash withdrawals of $7,497.21. Taking into account the closing credit balance of their account in the amount of $313.16, and the value (at cost) of 200 shares of Holly Corp. held by the Buttermans which were purchased through their account, the Buttermans' total net loss resulting from their speculations (principally in commodities) during the last half of the year 1959 is $8,189.77. See Exhibits 'A' and 'B' to this affidavit which are attached hereto and made a part hereof." (App. 76)

In addition the court failed to make any findings of fact or conclusions of law with respect to its rulings against the Plaintiffs and for the several individual defendants. It also failed to make any findings of fact or conclusions of law with respect to the 8 specific fact issues it preserved in its ruling of May 18, 1966 denying Plaintiffs' Motion for Summary Judgment. (App. 18-19, 23-4)

Therefore, in light of the pleadings and documents of record this judgment is erroneous on its face.

E.

The Opinion Is Without Basis in Fact or Law.

The opinion of the Seventh Circuit, without precedent or citation or authority, summarily ignored the law universally accepted in all several Federal Circuits and State Courts in proclaiming:

> "The rule that a party has a right to counsel of his choice and to change or substitute for his attorney of record is not absolute and is of no avail under the circumstances here. We think under the circumstances of this case there was no abuse of *discretion* in the

court's ruling. It follows that we see no violation of fundamental fairness." (Opinion p. 3) (Emphasis added)

The opinion not only ignored the accepted and unqualified right of a litigant to choose his own counsel, but reduced this right to a matter of discretion to be exercised *not by the client, but by the court.*

To do so the court of appeals misstated the facts in the record to conclude that "plaintiffs had ample time to acquire another attorney . . ." (Opinion p. 3) The record demonstrates that record counsel refused to resign without leave of court (App. 100) despite the fact she had been contacted by other counsel. (App. 91-100) The court will certainly take judicial notice of the reticence of another attorney to enter an appearance prior to resignation of record counsel. Record counsel for reasons not apparent would not and did not resign but instead in deference to the court and in derogation of her responsibility to her former clients appeared against their wishes and proceeded to a three hour bench trial "hearing on the merits." All this after informing the court before proceedings that her former clients ". . . had formulated a theory that I could not and still do not understand." (App. 101).

In denying plaintiffs' motion for summary judgment only several months before, the court indicated an opinion as to the merits of the case to the defendant Walston:

> "Actually, I am afraid I am going to have to try this case. Because of the age of the case I would like to get down to trial. It has been excellently handled by counsel for plaintiffs. They pulled together a matter which I think has stuck under the statutes and the law, which is an exceedingly difficult one to make it stick.
>
> "I have a hard time finding summary on the face of it. I will give another look at it between now and the

> trial date, but let me set the trial date. In the meantime, why, Walston & Company may consider the advisability of offering a very, very attractive settlement to the plaintiffs." (App. 86).

In light of subsequent events it is no wonder that the trial court evaluated the case differently in his summary findings and judgment order. It is submitted that such a practice in substance and procedure falls somewhat short of minimum standards of fairness in our concept of due process and ordered liberties.

Even if plaintiffs had "ample time" and were not diligent they should have been presented *pro se* with a motion for non-suit. They could have then appeared with or without an attorney to explain their position. The court would not permit this as it insisted on proceeding to a "hearing on the merits" with record counsel. The court's unauthorized and unreasonable position made it impossible for the parties in interest to protect themselves as outlined in *Link*. They could not discharge counsel, "I cannot resign . . ."; they could not proceed to trial with her, she "could not understand their theory"; they could not retain substitute counsel, "I cannot resign." Such a circuitous dilemma was created solely by the concert of action of the trial judge and the plaintiffs' record counsel. It was not caused by plaintiffs' inaction or lack of diligence as suggested in the opinion.

The court also misstated, misinterpreted and miscited applicable law.

> "And we do not read Sovich v. Sovich, 12 Ill. 2d 459, as militating against our conclusion that the ruling before us does not violate due process." (Opinion p. 3)

Savich v. Savich, 12 Ill. 2d 454, 147 N.E. 2d 85 (1958), cited above as "Sovich v. Sovich, 12 Ill. 2d 459", although

directly in point is dismissed summarily rather than distinguished on its facts. In this case the Illinois Supreme Court restated this clear and accepted principle.

> "From the record it appears that when the cause was called for trial, the attorney appearing for plaintiff asked to withdraw on the ground that plaintiff had discharged him, and no longer wanted him to represent her. The court denied the motion and directed the attorney to proceed with his direct examination, stating that the cause had been continued twice before and that plaintiff had not appeared on either occasion. When counsel asked plaintiff the preliminary questions of name and address, she turned to the court and explained that she spoke English poorly, and asked if the man questioning her was her lawyer. When told that he was, plaintiff refused to answer his questions, stating that she did not trust him, and that he had never talked to her about the case. She repeatedly asked for Mr. Kelly, the attorney she had requested to represent her, who was also present in the courtroom. Notwithstanding the assurances by the court that she would get a fair trial, plaintiff refused to answer counsel's questions until directed to do so by the court. The court told her original counsel that if plaintiff could not answer him, the court would question her. When asked by the court if she had any witnesses, plaintiff replied that she had, but had not been told to bring them." (pp. 455-456)
>
> • • •
>
> "In determining first whether the court erred in denying the motion to withdraw by plaintiff's attorney, after his client had dismissed him, we recognize the established right of a party to discharge his attorney at any time with or without cause, and to substitute other counsel, for a client is entitled to be represented by an attorney in whose ability and fidelity he has confidence. *Stone v. Baldwin*, 331 Ill. App. 421, 425; *Regan v. Chicago, Milwaukee and St. Paul Railroad Co.*, 204 Ill. App. 115; *Conlan v. Sullivan*, 280 Ill.

App. 332; *Pressney v. Pressney,* 339 Ill. App. 371; *People v. Franklin,* 415 Ill. 514; 7 C.J.S. 941.

In the *Pressney case* the court stated at page 374: 'Upon termination of the relation of attorney and client the latter has the right to substitute another for the person discharged, and the court cannot rightly continue a discharged lawyer as attorney or solicitor of record against the will of the client'." (pp. 457-458)

The error in citation and the facts of this case were clearly pointed out to the Court of Appeals in our Petition for Rehearing (page 6):

"If the court had allowed the plaintiff to discharge or substitute counsel, it then could have ruled upon the motion for continuance as presented either pro se or by substitute counsel. If the plaintiffs were denied the continuance and were unable to proceed, their suit could have been involuntarily dismissed for want of prosecution under Rule 41(b). This method would have entitled new counsel to petition the court pursuant to Rule 60(b) as suggested by the Supreme Court in *Link v. Wabash Railroad Co.,* 370 U.S. 626, 8 L. Ed. 734, 8 Sp. Ct. 1386 (1962). However, record counsel remained the only attorney recognized by the trial court until after the notice of appeal had been filed from the judgment previously acquiesced in by record counsel. Had the proper procedure been followed, the *Link* decision and its guidelines could have applied. As the record stands we have a bench trial on the merits, without the presence of the plaintiffs, but with representation of reluctant record counsel kept in the case by order of the same court that heard the issues on the merits. This procedure cannot be countenanced in our Federal Courts under the guise of administrative expediency. The relative inconvenience caused by a '15 day continuance' cannot justify so summary a disposition of individual citizens' rights. To deny litigants the right of counsel of their choice and to proceed as in this case, violates basic concepts of fundamental fairness and therefore due process."

CONCLUSION

In conclusion plaintiffs wish to quote the conclusion from their Petition for Rehearing wherein they attempted to point out to the Seventh Circuit Court of Appeals the far-reaching effect of such an ill-considered opinion.

> "If this court wishes to hold that the action of this court did not deny plaintiffs-appellants their right of counsel by choice, and therefore violate due process, it should clearly recite the sequence of events leading up to the December 16th 'trial on the merits', and then cite either precedent or an underlying rationale for the proposition that:
>
> > 'The rule that a party has a right to counsel of his choice and to change or substitute for his attorney of record is not absolute and is of no avail under the circumstances here.' (Opinion p. 3)
>
> This statement in and of itself has enough far-reaching implication to erode what is now accepted as a universal concept of Anglo-American Jurisprudence. 'A client may discharge or substitute counsel *at any time with or without cause.*' Perhaps contemporary considerations viewed in the light of the facts of this case warrant a departure from that rule. *'Cessante ratione legis, cessat et ipsa lex.'* If that be the case, then this court should recognize this as a clear departure from an outmoded concept and promulgate this new rule with an underlying policy and rationale which will support it in the face of long established and accepted precedent.
>
> "To simply state that right to counsel of choice is not absolute and espouse neither reason nor precedent is to judicially father a bastard concept in the law. If adopted by other courts, this bastard concept may in turn be used as authority to beget other illegitimate progeny in no way related to a legitimate and recog-

nized fundamental right; unless and until it dies an orphan's death on this court's doorstep.

"Because of the erroneous statements of fact and law in this opinion, and because of the momentous and far-reaching implications of this decision on Federal procedure under the United States Constitution, . . .",

We pray that this court grant our petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 16082 SEPTEMBER TERM, 1967 SEPTEMBER SESSION, 1967

WALTER BUTTERMAN and EMMY BUTTERMAN,
Plaintiffs-Appellants,

v.

WALSTON & CO., INC., a New York corporation, W. D. FLEMING, ALFRED J. RAUSCHMAN, BLANCHE BLAHUT, JAMES F. SULLIVAN, THE NEW YORK STOCK EXCHANGE, and G. KEITH FUNSTON,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 5, 1967

Before KILEY, SWYGERT and FAIRCHILD, *Circuit Judges.*

KILEY, *Circuit Judge.* This suit is to recover damages from defendants for money losses from stock and commodity transactions allegedly caused by violations of the Security and Exchange Act and constitution and rules of the New York Stock Exchange. The district court, without a jury, entered judgment for plaintiffs as to defendant Walston & Co., Inc. (Walston) in the amount of $313.16 which Walston concededly owed plain-

tiffs, but found against plaintiffs on the issues relevant to the damages sought for Walston's alleged breaches of duty. The district court also gave summary judgment for defendants The New York Stock Exchange and G. Keith Funston, President of the Exchange. Plaintiffs have appealed from both judgments. We affirm.[1]

The original complaint in this suit was filed on December 12, 1962. Following the filing of the complaint the Exchange made a motion to quash service and Walston a motion to dismiss. After voluminous briefs were submitted by all parties, the court granted plaintiffs leave to file an amended complaint. The amended complaint was filed on May 17, 1963, and contained five counts. Counts I through IV are directed at Walston, and allege the fraudulent holding out of Blanche Balhut as a qualified registered agent although Walston knew she was not fully qualified nor registered to deal in securities on any exchange. These counts also allege deception and manipulation of plaintiffs' account in violation of the Securities Exchange Act and the common law. Count V charges the Exchange with negligent failure to perform its duty to supervise its members as required by the Securities Exchange Act and the Exchange constitution, bylaws and rules, as a result of which Blanche Blahut was allowed to function as a fully registered qualified representative of Walston.

After the amended complaint was filed in May, 1963, the filing and consideration of a series of motions, including a motion to dismiss as well as several motions, answers, and responses concerning discovery, brought the case to November 22, 1965, when the cause was set

[1] Walston filed a motion in this court to affirm the judgment for plaintiffs against it, and the Exchange filed a motion to dismiss plaintiffs' appeal, or, alternatively, to affirm. The motions were taken with the case. In view of our judgment of affirmance, we need not pass on the motions.

for trial on December 27, 1965. The plaintiffs then filed a motion for summary judgment, and supporting and opposing memoranda and affidavits were filed. The Exchange filed a cross-motion for summary judgment which was followed by the filing of additional affidavits and memoranda. On May 18, 1966, the court denied plaintiffs' motion for summary judgment and on May 19, 1966, granted the Exchange's motion. Thereafter discovery continued between plaintiffs and Walston. After a pre-trial conference, trial was set for December 16, 1966.

On December 15, plaintiffs appeared *pro se* and moved to postpone the trial on the grounds that the second attorney to represent plaintiffs in the case had "stated" she would not represent them at the trial; that plaintiffs had "accepted her resignation"; and that plaintiffs were without representation. The postponement sought was to a "reasonable later date" within which "it will be possible" to secure new counsel. The motion was denied and plaintiffs' trial took place on December 16, 1966, as scheduled. The plaintiffs did not appear at the trial, although they knew that it would take place. Their interests were represented by their attorney of record. Plaintiffs claim the denial of their postponement request was an abuse of discretion, and a denial of due process, because a continuance was required due to the complex nature of their suit, the validity of their charges, and their right to discharge their attorney for cause.

The rule that a party has a right to counsel of his choice and to change or substitute for his attorney of record is not absolute and is of no avail under the circumstances here. We think under the circumstances of this case there was no abuse of discretion in the court's ruling. It follows that we see no violation of fundamental fairness.

The record before the district court when he ruled showed that plaintiffs' original record attorney withdrew because of differences with and accusations by plaintiffs, and that plaintiffs' second attorney of record had as early as July 19, 1966, informed plaintiffs of her desire to withdraw from the case. The court could conclude that plaintiffs had had ample time to acquire another attorney during the four months which had elapsed since their attorney's request that they do so and that their failure to do so should not be allowed to further delay the resolution of a case which had been pending for four years. Statements in *Link v. Wabash Railroad Co.*, 370 U.S. 626, about the right to an attorney of one's choice are of no help to plaintiffs. That point is not in question here. And we do not read *Sovich v. Sovich*, 12 Ill. 2d 459, as militating against our conclusion that the ruling before us does not violate due process.

The district court, after finding against plaintiffs on their charges against Walston, treated the complaint as for money due and owing—although it alleged a tort—and rendered judgment for plaintiffs for $313.16, the balance in plaintiffs' account with Walston. This judgment is challenged "on its face" but plaintiffs have shown no prejudice which they might suffer as a result of the judgment in their favor. The court's oral opinion at the close of the trial is sufficient to withstand plaintiffs' contention that there were no findings and conclusions underlying the court's rulings on the merits of the charges against Walston.

We are not persuaded by Walston that double costs ought to be assessed against plaintiffs, and therefore we deny that claim. 28 U.S.C. Sec. 1912 or 1927.

Exchange

The sole question properly before us with respect to the summary judgment for the Exchange is whether there was a genuine issue of material fact as to the liability of the Exchange for allegedly violating its duty under the Securities Exchange Act and its own constitution and rules by permitting Blanche Blahut to falsely hold herself out as a duly registered seller of securities. Plaintiffs have not met their burden of disclosing a genuine issue of material fact.

Affidavits in support of the Exchange's summary judgment motion state that in January, 1959, Walston applied to the Exchange for the limited registration of Blanche Blahut and that following a successful examination her application was approved; that in May, 1959, she passed the examination to be, and became, fully registered; that plaintiffs notified the Exchange on December 7, 1960, of their losses allegedly caused by Blanche Blahut's handling of their account; that in 1959 there were 1,360 individual members of the Exchange associated with 600 organization members who had 2,936 officers employing 25,000 registered representatives handling about 13,000,000 transactions; that the only information the Exchange had before plaintiffs' notice on December 7, 1960, concerning Blanche Blahut was the January, 1959, application, and the favorable investigation of Blanche Blahut made thereafter; that the Exchange had no knowledge of plaintiffs' account with Walston or, until December 7, 1960, of Blanche Blahut's alleged misconduct in handling the account; and that the Exchange had no knowledge, or practical way to obtain knowledge, until December 7, 1960, of any facts to put them on notice of alleged violation of any Exchange rule by Blanche Blahut. These affidavits were uncontested by any counter-affidavit.

The court concluded from the Exchange affidavits that the Exchange had no duty to supervise or review Walston's or Blanche Blahut's activities, nor any liability because of violation of its rules where it had no knowledge, or reasonable way of gaining knowledge, of alleged violations, and no duty to enforce its rules against violators until it had, or should have had, knowledge of violation or suspected violation. There was no genuine issue of material fact presented to the district court. Arguments advanced here not presented in the district court and statements and claims that ought to have been the subject of proper affidavits are of no avail to plaintiffs now.

There is nothing in the January, 1959, application on behalf of Blanche Blahut that can be reasonably read as controverting the finding that the Exchange had no knowledge of any violation of Exchange rules by Blanche Blahut until December 7, 1960. She is designated in that application as a Sales Trainee, desiring to take the examination for Special Mutual Fund (Limited) Registration. The statement above the caption "Nature of Duties" is solicitation of commission business and sale of unlisted securities. In the context of the entire form this statement must be read as disclosing the nature of duties she would perform upon becoming fully registered by the Exchange.

The conclusions of law on the uncontroverted facts are not erroneous. *Baird v. Franklin,* 141 F. 2d 238.

The judgment for plaintiffs against Walston and the

summary judgment against plaintiffs and for the New York Stock Exchange and G. Keith Funston, President, are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.